

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
825 North Capitol Street, NE, Suite 4150
Washington, DC 20002-4210

DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

DR. LISA M. NEWELL,
Respondent.

Case No.: DH-A-07-800008

ORDER REQUIRING SPAYING OF RESPONDENT’S DOG

On July 25, 2007, the Department of Health (“DOH”) filed a request for a hearing pursuant to D.C. Code, 2001 Ed. § 8-1902(a) to determine whether Respondent Dr. Lisa M. Newell’s Akita, named “Kim”, was to be deemed a dangerous dog as defined in D.C. Code, 2001 Ed. § 8-1901(1)(A). The Government also sought a further ruling from this administrative court, pursuant to D.C. Code, 2001 Ed. § 8-1903, that the dog “would constitute a significant threat to the public health and safety if returned to [its] owner.”

After an evidentiary hearing on August 15, 2007, this administrative court issued a Final Order (“Order”) determining that Kim was a dangerous dog as defined by D.C. Code, 2001 Ed. § 8-1901(1)(A)(i); however, the court also found that the Government’s evidence did not establish that Kim constituted a significant threat to the public if Respondent fulfilled all of the requirements set forth in D.C. Code, 2001 Ed. § 8-1904.¹ The Order afforded Respondent ten days to fulfill these requirements.

¹ The Honorable Louis J. Burnett, Administrative Law Judge, presiding.

On August 29, 2007, Respondent filed an affidavit and certain documents purporting to establish compliance with D.C. Code, 2001 Ed. § 8-1904. On September 5, 2007, the Government filed its Response to Respondent's Documents asserting that Respondent has fulfilled or has the ability to fulfill seven of the nine statutory requirements; however, the Government indicated that the Respondent had failed to fulfill two requirements. A telephone status conference was held in this matter on September 7, 2007. Angela S. Robinson, Esq., appeared on behalf of Respondent and Rudolf Schreiber, Esq., appeared on behalf of the Department of Health. During the status conference, Respondent indicated that she would address the outstanding issues. Judge Burnett set an additional telephone status conference for September 26, 2007.

Prior to the status conference, Respondent filed a Certificate of Compliance and Request for Immediate Return of Her Dog along with attached exhibits. At the status conference, the Government concurred that Respondent had complied with the outstanding requirements for release of Kim; however, counsel for the Government (Rudolf Schreiber, Esq.) indicated that on September 24, 2007, DOH had adopted an Emergency Rule ("Rule") that requires the spaying or neutering of any dog declared dangerous, but not a significant threat to the public health and safety, before that dog may be returned to its owner. Respondent objected to the application of the Rule to this case since it was adopted after she had fulfilled the requirements of the Final Order and renewed her request that Kim be immediately released.

Mr. Schreiber requested the opportunity to submit a memorandum of law on the issue of whether the Rule should apply to this case. As Respondent had met all requirements under the August 20, 2007, Order and this briefing would delay Kim's release from Animal Control, Mr. Schreiber did not object to the release of Kim pending this court's determination of whether the

Rule applied in this case, provided that certain fees associated with the dog's impoundment and release were paid. On October 2, 2007, the Government filed a Motion to Amend Order for Payment of Fees. In this motion, the Government argued that the fee charged Respondent for the time her dog was impounded by the Government was that set for spayed dogs and, as Kim is sexually unaltered; Respondent should have been charged a higher fee. If granted Respondent would be required to pay an additional \$34. Respondent did not reply to the Government's motion.

I. APPLICATION OF THE RULE TO THIS CASE

In its Post-Hearing Memorandum, the Government sets forth two basic arguments in support of its contention that the Rule applies to this case. Specifically, the Government argued: 1) this administrative court lacks jurisdiction to review "special security or care requirements" established by the Mayor pursuant to D.C. Code, 2001 Ed. § 8-1903; and 2) the Mayor has properly used his rulemaking authority to impose this special security and care requirement on all dogs designated dangerous, as compared to applying the consideration on individual cases in litigation. Respondent opposed the Government's attempt to apply the rule to Kim, because: 1) the Rule was adopted after she fulfilled the requirements of this administrative court's Order issued on August 20, 2007, and it should not be given retroactive effect; 2) this is not a proper exercise of the Mayor's rulemaking authority as the substance of this Rule is pending before the Council of the District of Columbia as a proposed amendment to the statute; 3) this administrative court has jurisdiction to review this and any special security and care requirement imposed by the Mayor; and 4) application of the Rule would unfairly impose a financial hardship.

Both sides make reasoned, well-thought out arguments in support of their respective positions. However, decisional authority governing the application of agency rules enacted and imposed during ongoing litigation supports the position of the Government. In an important case defining proper agency action on issues currently being litigated, the Court of Appeals for the District of Columbia Circuit has observed that since at least 1974 the U.S. Supreme Court has held that an administrative agency has “broad discretion to announce policy in adjudication [only] subject to an exception in a case of severe impact and justifiable reliance on contrary agency pronouncements.” *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 606 F.2d 1094, 1115 (D.C. 1979), *citing NLRB v. Bell Aerospace Co.*, 416 US 267, 295 (1974). In *NLRB v. Bell Aerospace Co.*, the Supreme Court quoted approvingly of a 1947 decision that held:

‘problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. *Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.* In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.’ The Court concluded that ‘the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.’

NLRB v. Bell Aerospace Co., 416 US at 293 *citing SEC v. Chenery Corp*, 332 U.S. 194, 202-203 (1947) (emphasis in original).

In a later case, the District of Columbia Circuit Court articulated concisely that “[t]he general principle is that when as an incident of its adjudicatory function an agency interprets a statute, it may apply that new interpretation in the proceeding before it.” *Clark-Cowlitz Joint*

Operating Agency v. Federal Energy Regulatory Commission, 826 F.2d 1074, 1081 (D.C. 1987) (citations omitted). These decisions make clear that an agency, in this case the Department of Health, in the throes of litigation has the authority to either render a case-specific interpretation of the implicated statute, or issue a wide-ranging rule, that impacts the course of pending litigation.

Respondent has argued that the Rule is being applied retroactively, which would, on its face, implicate the warning articulated by the Supreme Court and endorsed by the District of Columbia Circuit Court that application of an agency rule will not affect pending litigation if there is “severe impact and justifiable reliance on contrary agency pronouncements.” *Tennessee Gas Pipeline Co.*, 606 F.2d at 1115. However, Respondent’s assertion that the Rule is being applied retroactively is inaccurate. It appears that at least one reason why Respondent believes this to be the case is because the Order issued on August 20, 2007, is labeled “Final Order.” In hind sight, this label is a misnomer as to all the issues pending before this administrative court. By its very terms, the August 20, 2007, Order did answer certain aspects of the case with finality; namely, Kim’s status as a dangerous dog, who is not a significant threat to the public and can be returned to Respondent under certain conditions. Ultimately, however, those conditions were reserved in the August 20, 2007, Order for future litigation and in fact two subsequent status conferences were held and each party submitted additional pleadings. Thus, on the crucial point currently before me, no final resolution by this administrative court has occurred as to the satisfaction of the conditions warranting the return of Kim, even though the August 20, 2007, Order is labeled “Final Order.” I understand that Respondent may feel like she had satisfied the requirements of the August 20, 2007, Order and, therefore, application of the Rule to Kim would be retroactive; in actuality as this administrative court had made no final

determination concerning Respondent's compliance with D.C. Code, 2001 Ed. § 8-1903, the Rule is not being applied retroactively to this case.

Moreover, even if it were retroactively applied, there is nothing on the record to support a finding that Respondent will suffer severe impact as a result of justifiable reliance on contrary agency pronouncements if the Rule were applied. Starting with the notion of Respondent's "justifiable reliance on a contrary agency pronouncement," to the best of my knowledge, the Government has never issued an "agency pronouncement" on the neutering or spaying of dangerous dogs that are to be returned to their owners. So, there was no "contrary agency pronouncement" on which Respondent could justifiably rely. Admittedly, the District of Columbia Circuit Court has ruled that in certain circumstances, agency silence on a matter "must be construed to mean that traditional principles retain their vitality." *Tennessee Gas Pipeline Co.*, 606 F.2d at 1110. However, the District of Columbia Circuit Court went on to note that, as shown above, "traditional principles" can be changed during adjudication, and, if a party wants to successfully challenge that new pronouncement, it must, at a minimum, "demonstrate that a preponderance of the interpretative evidence is favorable to their position." *Tennessee Gas Pipeline Co.*, 606 F.2d at 1110.

The Rule, as noted above, requires a dangerous dog that has been found not to constitute a significant threat to the public health and safety must be neutered or spayed prior to being released to the dog's owner. In this case, the main evidence the Government presented to support a conclusion that Kim was a significant threat was that Kim fought another dog (Hound) shortly after attacking the victim in the Government's case in chief (Clyde). The Government alleged that the fight with Hound established that Kim was overly aggressive and could not be safely returned to Respondent. In response to the Government's position, Respondent argued at

the August 15, 2007, hearing that both Kim (a female) and Hound (a male) were sexually unaltered, so that Kim's lunge toward Hound was a natural reaction of two sexually mature, unaltered dogs, when one (Kim) was stressed from her fight earlier that day with Clyde, and not a demonstration of overly-aggressive behavior on Kim's part.

However, in opposition to the Government's position that Kim should be spayed to reduce her aggressive tendencies as a condition of her release to Respondent, Respondent now argues that spaying is an unproven remedy for canine aggression. Simply put, Respondent cannot have it both ways: she cannot argue on the one hand that Kim's aggressive behavior toward Hound stems from the fact that Kim is a sexually mature, unaltered dog (as compared to just dangerously aggressive); and, on the hand, that spaying Kim would not help reduce her aggressive behavior. Respondent has presented no evidence other than her opinion to support her position.

Therefore, I conclude that Respondent has not justifiably relied on a contrary agency pronouncement. Further, even if the Government established by its silence a "traditional principle" that spaying or neutering dangerous dogs before the animals are released to their owners was unnecessary, I conclude that the Government has properly exercised its authority to proceed with a general rule governing the subject matter. I also conclude that Respondent has failed to "demonstrate that a preponderance of the interpretative evidence is favorable" to her position.

Additionally, even though Respondent would have to prove both justifiable reliance and "severe impact" and I have just concluded that there was no justifiable reliance, there is also no evidence that Respondent will suffer severe impact as a result of the new Rule. In her Reply to

the Government's post-trial memorandum, Respondent made a vague assertion that spaying Kim "is extreme" and will have significant financial impact on Respondent, because she will not be able to breed Kim. However, Respondent has presented no evidence that she ever bred Kim prior to the initiation of this case, or that she ever contemplated breeding Kim, prior to devising her defense to the Government's attempts to spay Kim. As noted by Respondent in her Reply, Kim is "essentially a house dog." I also doubt that the loss of breeding fees would rise to the level of "significant impact" envisioned by the District of Columbia Circuit Court.

In order for Respondent to prevail in her argument that the Rule should not apply to this case she has to establish three things: 1) that the Rule is being retroactively applied; 2) that to allow retroactive application of the Rule will result in severe impact; 3) because she has justifiably relied on contrary agency pronouncements. *Tennessee Gas Pipeline Co.*, 606 F.2d at 1115. As set forth above, I concluded that Respondent has proven none of the three requirements.

Thus, I conclude that it is proper to apply the Rule to this case and Kim is to be spayed. If Respondent does not comply with this determination; I have concluded that Kim is a significant threat to the public health and safety. At which point, the Government will be authorized to impound Kim and, only on future order of this administrative court, have her humanely destroyed.² D.C. Code, 2001 Ed. § 8-1903. To the extent there are other points raised

² In its Memorandum, the Government also argued that this administrative court did not have jurisdiction to "make determinations about the special security or care requirements that the Mayor identifies as necessary for an owner to take possession of a dangerous dog." Memorandum, page 4. However, in light of my ruling in this case, I can, in the words of the District of Columbia Circuit Court, "by-pass petitioner's" assertions and arguments. *Tennessee Gas Pipeline Co.*, 606 F.2d at 1110.

by Respondent in her opposition that are not specifically addressed herein, I have considered and rejected these points.

II. THE GOVERNMENT'S MOTION TO AMEND THE FEE ORDER

In its motion, the Government acknowledged that the sought-after, higher fee would not apply if "this administrative court rules that the spaying requirement does apply to the instant case." Government's Motion, page 1. Given my ruling that Kim has to be spayed, the Government's motion is moot and will be dismissed as such.

Accordingly, it is, this 6th day of November 2007

ORDERED that Respondent shall make Kim available to the Government for spaying as soon as possible and, in any event, no later than November 30, 2007; it is further,

ORDERED that if Respondent does not make Kim available for spaying as required herein, the Government may impound Kim as a significant threat to public health and safety and, after further order of this administrative court, humanely destroy Kim; it is further

ORDERED that the Government shall file a notice indicating that Kim has either been spayed or impounded within five business days after the completion of one of these acts; it is further

ORDERED that this order is hereby **STAYED** until November 13, 2007 (five business days to allow service by mail). Respondent shall then have five days, until November 18, 2007, to seek review in the D.C. Court of Appeals and a further stay from that court. This

administrative court's stay shall expire automatically, without further order of this administrative court, on the day noted above, unless the D.C. Court of Appeals grants a further stay; it is further

ORDERED that the Government's Motion to Amend the Order for Payment of Fees is
DISMISSED as moot.

November 6, 2007

_____/SS/
Jesse P. Goode
Administrative Law Judge